IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 3 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAI GOPAL INFRASTRUCTURE LTD

Versus

O. L. OF NUTAN MILLS LTD.

Appearance:

1. COMPANY APPLICATION No. 3 of 2001

MR SN SOPARKAR for Petitioner No. 1-6

NOTICE SERVED BY DS for Respondent No. 1,4-9,11-12

MR SANDEEP SINGHI FOR SINGHI & CO for Respondent No. 2

MR MG NAGARKAR for Respondent No. 3

MR DS VASAVADA for Respondent No. 10

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision:26/03/2004

CAV. JUDGEMENT

1 The applicants are the nominees of one Jitu

Builders Private Limited. Nutan Mills Limited was ordered to be wound up by order dated 6/7/1993 and respondent no.1 was appointed as the Official Liquidator. On 18/11/1999 this Court appointed Sale Committee for the purpose of disposing of the assets of the Company in liquidation. Representative of respondent No.2 viz. Industrial Investment Bank of India Limited was appointed as Chairman of the Sale Committee. The Sale Committee invited offers for purchase of various properties of the Company in liquidation including a plot of land admeasuring about 74375 sq.yds. along with superstructure thereon situated at Anil Starch Road, Via Vora's Roja, Saraspur, Ahmedabad (hereinafter referred to as 'the property'). Jitu Builders Private Limited was found to be the highest bidder at Rs. 5.95 crores and accordingly by order dated 18/2/2000 in Company Application No. 25 of 2000 the Court accepted and confirmed the sale in favour of said Jitu Builders Private Limited. Thereafter, on 7/9/2000 this Court directed respondent No.1 to execute the sale-deed in favour of Jitu Builders Private Limited or its nominee/nominees in light of the fact that full amount of consideration was received by respondent No.2. Accordingly on 21/11/2000 respondent No.1 executed a sale-deed as Vendor and respondent No.2 acted as confirming party with the applicants being the purchasers.

2 On 10/11/2000 the applicants received notice from respondent No.3 - Ahmedabad Municipal Corporation whereby an amount of Rs.4,45,60,777.85 (Rupees Four crores Forty-five lacs Sixty thousand Seven hundred and Seventyseven and paise Eightyfive only) was sought to be recovered being outstanding municipal tax liability. Admittedly, the bill was raised by respondent No.3 Corporation in the name of the Company in liquidation. The applicants' objection to the effect that the applicants were not liable to discharge the said liability was not accepted by respondent No.3 and it was informed that recovery would be effected from the property. It is in the aforesaid circumstances that this application has been moved and following reliefs have been sought by way of Judge's Summons :

"[a] to hold that the applicants are not liable for payment of any property tax in respect of the land and building or Nutan Mills Ltd.(in liquidation) purchased by the applicants from the opponents No.1

and 2;

[b] to direct the opponents No.1 and 2 to pay the municipal taxes, if any, in respect of the land and building of Nutan Mills Ltd. (in liquidation) purchased by the applicants under the sale deed dated 21/11/2000;

[c] pending the admission, hearing and and final disposal of this application, to restrain the 3rd opponent from taking any action against the applicants for non-payment of municipal taxes on the properties of Nutan Mills Ltd. (in liquidation);

[c] any other and further relief deemed just and proper in the facts and circumstances of the case be granted".

3 Mr.S.N.Soparkar, learned Senior Counsel appearing on behalf of the applicants submitted that the levy of municipal tax has to be primarily decided on the basis of statutory provisions of the Bombay Provincial Municipal Corporations Act, 1949 ('BPMC Act'); that respondent No.3 cannot take recourse to agreement between the applicants and other respondents. That taxes cannot be recovered from the applicants by respondent No.3 in absence of respondent No.3 establishing existence of liability on the basis of some statutory provisions qua the applicants.

3.1 It was further contended that the purchaser of property in liquidation has no obligation to pay taxes in respect of the period upto the date of purchase. That the taxes upto date of winding up are the liabilities required to be discharged by the liquidator in terms of provisions of Sections 529 & 530 of the Companies Act, 1956. That taxes from the date of liquidation till date of sale are required to be treated as expenditure or cost in liquidation and must be paid in accordance with Section 476 of the Companies Act.

3.2 In the alternative, it was contended that even if it is held that in law there is such a liability qua the applicants, which the applicants are required to discharge at this stage, it be held that the applicants are not liable because :

[a] as per terms of the sale-deed and in particular, clause nos. 1, 2 & 3, the property is sold to the applicants free from any charge or encumbrances of any nature and thus the Vendors are required to discharge such a liability;

[b] "terms and conditions of sale" cannot govern rights and obligations of the parties once the final sale-deed is executed and such terms and conditions are merely offer and counter offer;

[c] that till date no attempt is made to rectify the terms of the sale-deed as per Section 26 of the Specific Relief Act; and

[d] without prejudice to any of the aforesaid grounds, the terms and conditions of sale, even if applicable, would go to show that the liabilities referred to are only liabilities arising in future i.e. after the date of sale, and the same cannot include municipal tax liabilities of the period prior to the date of sale.

4 Mr.Sandeep Singhi, learned Advocate appearing on behalf of respondent Nos. 2 and 4 respectively submitted that the applicants are Nominees of Jitu Builders Private Limited and they step into shoes of the said party. That Jitu Builders Private Limited was aware of the terms and conditions of sale and the same form part of the order of confirmation made by this Court on 18/2/2000. Inviting attention to condition No.3 of the terms and conditions of sale it was submitted that it was for the purchaser to satisfy itself in all respects before purchasing and no dispute of any kind or description can be entertained in this behalf after sale. That the purchaser was obliged to take properties with all defects, errors of descriptions and subject to all risks.

4.1 That condition No.16 of the terms and conditions clearly stipulates that the property tax, land revenue and lease rent etc. shall be borne and paid by the purchaser.

4.2 That as per condition No.23 the purchaser shall

be liable to pay the sales tax and all other local and other cesses, duties and taxes, if any, in respect of and/or affecting the property herein for which the purchaser has given the offer. That the said term speaks of all the taxes due, which means prior to the date of sale and cannot be read to mean payment of tax to be made prospectively, which the purchaser would even be otherwise liable to pay.

4.3 That the purchaser was also aware of outstanding municipal dues and therefore the price which was offered was after taking into consideration the amount of municipal tax payable by the purchaser, otherwise higher amount would have been fetched for the property.

4.4 That municipal tax liability till date of liquidation and between liquidation and date of sale cannot be treated as cost in liquidation as the liability to pay such tax travels with the property.

4.5 That clause (1) of the sale-deed which states that the property would be free from all encumbrances, charges, mortgage, lien or any attachment only conveys that the property is transferred without any mortgage, charge, lien etc. of the secured creditors and the sale-deed has to be read in context of the order dated 18/2/2000 made by this Court.

5 Mr.D.S.Vasavada, learned Advocate appearing on behalf of respondent No.10 i.e. Textile Labour Association submitted that the applicants cannot be granted any relief as the property had been sold 'as is where is' and ' as is whatever there is'basis. He also relied on condition No.3 to submit that the purchaser must have inspected the property and satisfied himself as regards existing dues. In relation to other terms and conditions he relied on the contentions raised by Mr.Singhi. Reliance was placed on judgment of this Court reported in Ahmedabad Municipal Corporation Vs. Saurashtra Paints (Pvt.) Ltd., reported in 2002(2) GLR 1109 for the proposition that in light of provisions of BPMC Act, the charge over the property can be enforced even against bonafide purchaser for value without notice. That, however, in the present case the terms and conditions of the sale and the order of the High Court could be treated as prior notice and the purchaser was bound to pay taxes of the Municipal Corporation.

6. Mr.Nagarkar, learned Advocate appearing on behalf of respondent No.3 - Municipal Corporation placed reliance on Chapter VIII falling within Appendix IV of

the BPMC Act which deals with Taxation Rules and invited attention to Rule 3(1) read with Rule 2(3) of the said Rules to contend that under Rule 1 notice of transfer was required to be given by the transferor and the transferee and it was open to the Corporation to effect recovery either from the transferor or from the transferee; that there was an overriding liability of the transferee and by virtue of Section 141 of the BPMC Act the charge was fastened on the property. Referring to terms and conditions of sale it was submitted that they were not prospective in nature and the conditions imposed by the Court were not fulfilled by the purchaser- applicant. It was therefore submitted that the Corporation was entitled to seek recovery of dues from the applicants in accordance with law.

7. As can be seen from the provisions of Section 141 of the BPMC Act property taxes due under the said Act in respect of any building or land shall be a first charge upon the building or land and belonging to the person liable for such taxes. For the purpose of ascertaining who is the person liable one has to refer to provisions of Section 139 and more particularly Section 139(1)(b)(iii) of the BPMC Act. As laid down by the Division Bench of this Court in the case of Ahmedabad Municipal Corporation Vs. Saurashtra Paints (Pvt.) Ltd. (supra) since the property taxes constitute first charge upon the land/building and because land or building is fastened with this liability, the liability transfers with the land or building. The transferee is liable to pay the property tax due thereon not only for the period subsequent to transfer in his favour but even for the period anterior to the transfer. The reliance by the learned Advocate for the applicants on the decisions of learned Single Judge of this Court therefore would not assist the case of the applicants in light of the aforesaid decision of the Division Bench of this Court. It is necessary to note that the Supreme Court decision in the case of Ahmedabad Municipal Corporation Vs. Haji Abdul Gafur Haji Husseinbhai, AIR 1971 SC 1201 which forms the basis of the order dated 25/6/1997 rendered in Company Application No. 62/96 by the learned Single Judge has been taken into consideration by the Division Bench of this Court along with subsequent decision of the Supreme Court in the case of Municipal Corporation of Delhi Vs. Trigon Investment Corporation, AIR 1996 SC 1579 and therefore, it is not possible to state that the view expressed by the learned Single Judge should prevail against the opinion expressed by the Division Bench of this Court.

8 Coming to the facts of the case as can be seen on 18/2/2000 this Court while confirming the sale in favour of Jitu Builders Private Limited specifically held :

> "In the circumstances, sale in favour of M/s. Jitu Builders P.Ltd. for Lot No.I is hereby confirmed for consideration of Rs.5.95 crores on the conditions of sale which are at page 26 of the application and which were duly notified at the time of auction and of which M/s.Jitu Builders P.Ltd. is aware of".
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> "After receipt of the entire payment of consideration by the applicant, necessary documents shall be executed for the purpose of transfer of the land in question in favour of M/s.Jitu Builders P.Ltd. or a person or a party which might be nominated by the said company. In that event, the terms and conditions on which the property has been sold to M/s.Jitu Builders P.Ltd. would also be binding upon the nominee of the purchaser in whose favour the land in question is to be transferred".

9 Thus, the Court has confirmed the sale in favour of Jitu Builders Pvt.Ltd. on the conditions of sale which are at page 26 of the application being Company Application No. 25 of 2000, which were duly notified at the time of auction and of which Jitu Builders was aware. It is further recorded that Jitu Builders Pvt.Ltd. is entitled to nominate a person or a party in whose favour necessary documents shall be executed for the purpose of transfer of the land in question after receipt of the entire payment of consideration, and in that event, the terms and conditions on which the property has been sold to Jitu Builders Pvt.Ltd. would also be binding upon nominee of the purchaser in whose favour the land in question is to be transferred. The position is therefore very clear that the terms and conditions of sale are by reference incorporated as part of the order of this Court and it is now not permissible to the applicants to contend that such terms and conditions cannot bind the applicants.

10 Relevant terms and conditions i.e. Nos.2, 3, 16, 20 & 23 which have been referred to by the parties read as under:

"2. The sale of the properties is on 'as is where is' and 'as is whatever there is' basis and subject to the resale price or any prices fixed by Sale Committee. The Sale Committee does not warrant accuracy of the description given in the Schedule(s) hereunder written.

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3. The properties comprised in and forming part of the sale are sold with all defects, faults, imperfections and errors of description. The Sale Committee is not answerable for the correct description, genuineness, veracity, authenticity of any faults or defects in immovable properties and make no warranty of any kind whatsoever. The purchaser should make his own inquiry about the properties and the same will be sold on 'as is where is' and 'whatever there is' basis and in such conditions as they are at the time of the sale. The purchaser shall satisfy himself on all aspects before purchasing and no dispute of any kind or description will be entertained in this behalf after sale. The purchaser shall take the properties with all defects, errors of description and subject to all risks. The purchaser shall be deemed to have inspected and approved of the property to his entire satisfaction before sale.

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16. The property tax, land revenue and lease rent etc. shall be borne and paid by the purchaser.

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20. The property is sold subject to the subsisting convenants, if any, in respect of removable property, assessments, rights of way, easement, outgoings etc. and all incidents of tenure affecting the property. The purchaser shall ascertain

and satisfy himself in all respect about the title in respect of the said property before submitting and making offer and the purchaser shall not make any requisitions on that account.

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23. The purchaser shall be liable to pay the sales tax and all other local and other cesses, duties and taxes, if any, in respect of and/or affecting the property herein for which he has given the offer.

11 The respondents are right when they contend that the sale of the property is on 'as is where is' and 'as is whatever there is' basis and the purchaser was bound to satisfy himself on all aspects before purchasing and cannot raise any dispute of any kind or description after sale. That the purchaser is bound to take the property with all defects, errors of description and subject to all risks. The purchaser is deemed to have accepted and approved of the property to his entire satisfaction before sale. That the property tax, the land revenue and lease rent etc. are to be borne and paid by the purchaser. That the property is sold subject to its subsisting covenants and tenure affecting the property. That the purchaser is bound to pay sales tax and all other local and other cesses, duties and taxes in respect of and/or affecting the property herein for which the purchaser is given offer. Thus, on conjoint reading it is apparent that the purchaser had to satisfy himself in relation to the property in question in all respects and cannot raise any dispute at this belated stage after the sale. The purchaser herein includes the nominee of the purchaser and would thus include the applicants. The contention on behalf of the applicants that even if the said terms and conditions are applicable, they would apply prospectively requires to be stated only to be rejected. As it is, once the property is transferred by a legal and valid document in law all future liabilities in relation to the property transferred would always be the liability of the purchaser, and hence it is not necessary to incorporate such terms and conditions in relation to future liabilities. The contention that the terms and conditions are mere offer or counter offer and cannot govern or override the terms and conditions of the sale-deed loses sight of the fact that the said terms and conditions have been incorporated as part of the order dated 18/2/2000 confirming the sale. That the final sale

deed has been executed in pursuance of the said order. It is apparent that the said terms and conditions would form part of the said order of the Court as can be seen from the relevant extract reproduced hereinbefore, and would thus be binding on the purchaser.

12 On behalf of the applicants great emphasis was laid on the sale-deed executed on 21/11/2000. It was submitted that the following terms of the sale-deed discharged the applicants from any encumbrances, charges, etc. and unless and until the said terms are rectified or modified in any manner whatsoever the terms are binding on the parties and the past liabilities are required to be discharged by the liquidator.

"(1). xxx xxx the Vendor do hereby grant, release, convey and transfer and assure unto the purchasers convey and assure unto the purchasers and the confirming party doth hereby confirm, all and singular, free from all encumbrances, charges, mortgages, lien or any attachment on the demised premises.

(2) It shall be lawful for the purchasers from time to time and at all times hereafter peaceably and quietly to hold, enter upon, occupy, possess and enjoy the demised premises under these presents hereby expressly granted, conveyed, transferred and assured together with the superstructures if any standing thereon, without any suit, encumbrance, claim, demand and disturbance whatsoever from or by the Vendor or any of the secured creditors or any other person or persons lawfully and equitably claiming by from order or in trust for them and that free and clear and freely and clearly and absolutely acquitted, exonerated released and for ever discharged or otherwise by the Vendor well and sufficiently defended and kept harmless against all claims charges and encumbrances whatsoever of the vendor/confirming party and the other secured creditors mentioned hereinabove. With respect to the demised premises under these presents.

(3) The vendor assures and the confirming party confirms sound title and quiet enjoyment of the demises premises under these presents free from all encumbrances, claims, mortgage, lien, attachment or charges due by the vendor/confirming party itself or all other secured creditors recited hereinbefore in respect

of the demised premises ..."

13 For the purpose of appreciating the aforesaid contention it is necessary to read the document of sale dated 21/11/2000 as a whole. The purchaser is aware that even in the sale-deed it is mentioned that the deed has been executed in pursuance of the sale confirmed in favour of Jitu Builders Private Limited by this Court vide its order dated 18/2/2000 in Company Application No. 25 of 2000. Similarly, reference to the applicants, who are nominees of Jitu Builders Private Limited is also in light of the order dated 18/2/2000 passed by this Court. Now coming to the terms of the sale (reproduced hereinbefore) on which reliance has been placed by the applicants, as can be seen the vendor and the confirming party convey and assure the purchaser that they grant release, convey and transfer the property free from all encumbrances, charges, mortgage, lien or any attachment on the demised premises. This would indicate that the vendor and the confirming party execute sale-deed and grant, release, convey and transfer the property free from all encumbrances, charges, mortgage, lien or any attachment which the vendor or the confirming party had. In other words the confirming party is acting on behalf of the Sale Committee constituted by an order of this Court and represents all creditors including secured creditors, unsecured creditors and workers of the company in liquidation. This is absolutely clear from aforesaid Clause (2) of the sale deed. Therefore, the confirming party and the vendor who represent the aforesaid persons or class of persons can convey and transfer or release or grant only such interest, including charge/lien etc., which such persons had on the demised premises. It is settled position in law that the transferor cannot transfer anything which the transferor does not possess, whether it be a right or a liability. Admittedly, the encumbrance, charge, mortgage, lien etc. created by the creditors along with pari passu charge of the workers are the only things which the vendor and the confirming party can convey or grant or release through sale. The charge on the property under section 141 of the BPMC Act, which goes along with the property, can never be released or granted either by vendor or by confirming party as it is not possible for them to do so, the charge being a statutory charge. Moreover, respondent No.3 Corporation was not a party to the transaction. In the circumstances, the contention raised on behalf of the applicants based on the terms of the sale-deed does not carry the case of the applicants any further.

14 The contention that the tax upto the date of winding up are the liabilities to be discharged by the liquidator u/Ss. 529 & 530 of the Companies Act and the tax from the date of liquidation till date of sale must be treated as an expense or cost in liquidation u/s.476 of the Companies Act cannot be accepted for the simple reason that as per terms and conditions of the sale the applicants were aware as regards the nature of the property, the condition of the property, which would include all charges, statutory and others, and hence at this stage cannot make a grievance that it is for respondent No.1 or other respondents to discharge such liabilities.

15 In the result, it is not possible to hold that the applicants are not liable to pay any property tax in respect of the property of the company in liquidation purchased by the applicants, and hence, it is not possible to direct the respondents to pay the municipal tax. In the result the application fails and is accordingly rejected. There shall be no order as to costs.

(D.A.Mehta, J)

m.m.bhatt